



Legal Update

December 2018

The SJC rules that art. 14 provides greater protection than the Fourth Amendment where the police relied on a reasonably foreseeable exigency to justify making a warrantless entry into a dwelling to arrest an occupant.

Commonwealth v. Alexis, 481 Mass. 91 (2018): On the morning of June 14, 2016, Lynn police officers responded to a report of a home invasion. The victim, Shomar Garcia, lived at the apartment with his wife and two children. Garcia told police that three African-American males had forced their way into the apartment and one of them struck him in the face with a silver handgun. The men restrained Garcia with duct tape and took his jewelry and wallet. Before leaving the house, the man with the silver handgun struck Garcia's six month-old baby in the face with the gun. Garcia recognized the man with the silver handgun, looked through a "few hundred photos" at the police station, saw a photograph of the defendant, and stated with "[one hundred] percent" certainty that the photograph was of the man who had hit him and his baby. Detective Stephen Pohle wrote a report and applied for an arrest warrant to be processed in court the next morning. Significantly, Detective Pohle did not seek an after-hours arrest warrant.

For specific guidance on the application of these cases or any law, please consult with your supervisor or your department's legal advisor or prosecutor.

The next morning, Pohle telephoned Sergeant Michael Kenny, the supervisor of the Lynn Police Department warrant task force, and advised Kenny that he was in the process of obtaining an arrest warrant for the defendant. Sgt. Kenny recognized the defendant's name as a person with whom he had recently spoken while investigating another matter. Sgt. Kenny also knew where the defendant lived.

Sgt. Kenny and four other members of the warrant task force drove to the defendant's address without an arrest warrant. Based on the information Sgt. Kenny had -- the defendant's identification being fresh, the violent nature of the home invasion, the defendant's role in it, his possession of a firearm, the involvement of two accomplices, and the possibility that they might flee -- he believed that he had probable cause to arrest the defendant and that exigent circumstances permitted a warrantless arrest. The police, who were dressed in plain clothes and driving unmarked vehicles, planned to set up a perimeter around the house because they thought the defendant may flee or destroy evidence.

As Sgt. Kenny approached the front steps, the defendant saw the officers through the glass front door. The defendant turned around and ran toward the back of the house. One of the officers who was setting up a perimeter observed the defendant climbing through a window in the back of the house. Police told the defendant to show his hands and he retreated into the house, out of the officer's view. Because of the volatile situation and the nature of the crimes involved, the officers forced their way through the front door. As they entered, they noticed the defendant coming toward them from the back of the home. The officers ordered the defendant to the ground and handcuffed him in the hallway. After the defendant had been restrained, the officers conducted a protective sweep of the house and secured the premises. Police saw in plain view jewelry which matched the description of the jewelry taken from the home invasion.

Sgt. Kenny applied for and received a search warrant for the premises. During the execution of the search warrant, the police seized items of evidentiary significance, including jewelry, a wallet, an electrical stun gun, and various identification cards bearing the defendant's name. Also, police discovered clothing that matched the description given by Garcia of the clothes worn by the home invaders. Following the search warrant execution, Garcia confirmed that the sweatshirt and the pants were consistent with the clothing worn by the defendant during the home invasion.

Conclusion: The SJC concluded that because there were no exigent circumstances authorizing the officers' warrantless entry into the defendant's home, the entry was unlawful and evidence found in plain view during the protective sweep was suppressed.

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1st Issue: Did exigent circumstances exist to justify the police making a warrantless arrest in the defendant's home?

The SJC held that there were no exigent circumstances that justified the warrantless arrest of the defendant inside his home. The defendant contended that his rights under art. 14 were violated when police entered his home without a warrant and arrested him. According to the defendant, the police created the exigency themselves by not procuring an arrest warrant before going to the defendant's residence. A warrantless entry into a home is justified only if the police had probable cause and exigent circumstances. Under the exigent circumstances exception to the warrant requirement, "there must be a showing that it was impracticable for the police to obtain a warrant, and the standards as to exigency are strict." *Commonwealth v. Forde*, 367 Mass. 798, 800 (1975). In *Forde*, the SJC found that "a warrantless entry into a dwelling to arrest in the absence of sufficient justification for the failure to obtain a warrant" is impermissible and that "where the exigency is reasonably foreseeable and the police offer no justifiable excuse for their prior delay in obtaining a warrant, the exigency exception to the warrant requirement is not open to them." *Id.* at 803. *Forde* was decided solely on the basis of the Fourth Amendment. *Id.* at 805-806. In *Commonwealth v. Molina*, 439 Mass. 206, 211 (2003), the SJC held that "[t]he exigent circumstances requirement is not satisfied by virtue of altercations resulting from a warrantless arrest at the home, where there is no showing of exigent circumstances leading to the warrantless arrest itself." The Supreme Court subsequently ruled in *Kentucky v. King*, 563 U.S. 452, 462 (2011), that where "the police did not create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment, warrantless entry to prevent the destruction of evidence is reasonable and thus allowed." This caused the Appeals Court to state that "*Molina* and *King* thus appear inconsistent with each other as a matter of Fourth Amendment jurisprudence." *Commonwealth v. Gentile*, 80 Mass. App. Ct. 243, 251 (2011).

The SJC had to consider whether art. 14 offers more protection than the Fourth Amendment in situations where law enforcement's lawful conduct created the exigent circumstances that they used to justify a warrantless search, a question not addressed by the SJC in *Molina*. The SJC has repeatedly emphasized the importance of a person's right to privacy in the home. Here, "balancing the interests of law enforcement with the rights of people to be protected from warrantless searches in the home, the SJC concluded that art. 14 provides greater protection than the Fourth Amendment in these circumstances and that under art. 14 the police cannot avail themselves of the exigency exception to the warrant requirement when it was foreseeable that their actions would create the exigency, even if their conduct was lawful." *Commonwealth v. Alexis*, 481 Mass. at 99-100.

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2nd Issue: Did exigent circumstances make it impracticable for police to obtain an arrest warrant?

The SJC also had to examine whether it was impractical for police to get a warrant before arriving at the defendant's house. The police did not pursue an after-hours arrest warrant nor did they wait for a warrant before heading to the defendant's house in the morning. There was no doubt that the police had probable cause to arrest the defendant and there was also nothing preventing police from approaching his home and knocking on the door. *Commonwealth v. Leslie*, 477 Mass. 48, 57 (2017). Forgoing multiple opportunities to procure an arrest warrant further highlighted the unreasonableness of the arrest and suggested that the police intended to arrest the defendant without a warrant.

Additionally, there was no evidence that there was a risk that the defendant would flee, destroy evidence, or be a risk to the officers' safety if the police followed the normal course and secured a warrant. The crime occurred the previous day, and there was no evidence that the defendant even knew or had reason to know that he was a suspect before the police arrived at his home. See *Commonwealth v. Colon*, 449 Mass. 207, 217, cert. denied, 552 U.S. 1079 (2007) (exigent circumstances existed where witnesses to shooting told police that shooters had run into building and officers knocked on door and received no answer notwithstanding noises coming from apartment). The exigent circumstances that emerged during the arrest were a result of the officers' appearance at the dwelling. Based on these factors, the SJC determined that it was not impracticable for police to get an arrest warrant, and therefore the arrest of the defendant in his dwelling without a warrant was unreasonable. Because the defendant's warrantless arrest in his apartment was unlawful, the police could not rely on the plain view doctrine to allow the post-arrest observations in evidence. *Forde*, 367 Mass. at 807.

NOTE: The SJC found that probable cause to issue the search warrant remained even without the benefit of Sgt. Kenny's plain view observation of the stolen jewelry because it was reasonable to expect that the handgun used to strike both Garcia and his infant baby would be in the defendant's home the day following the armed home invasion.

The SJC affirmed the lower court's order suppressing the evidence because the Commonwealth did not argue that probable cause justified the issuance of the search warrant even if the observations of the jewelry were redacted from the affidavit in support of the warrant.

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